No. 94-1804

In The

Supreme Court of the United States

October Term, 1994

WILLIAM WILLIAMS, *et al.*,

Petitioners,

vs.

ASHLAND ENGINEERING, *et al.*,

-and-

UNITED STATES FIDELITY & GUARANTY CO. and R.W. GRANGER AND SONS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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The purpose of this supplemental brief, filed pursuant to Rule 15.7, is to advise the Court of the potential significance of its recent decision in *New York State Conference of Blue Cross & Blue Shield Plans, et al. v. Travelers Insurance Co., et al.*, __ U.S. __ (Slip Op.), 63 U.S.L.W. 4372 (April 26, 1995) (No. 93-1408 *et al.*) for the disposition of this petition.

In the *Travelers* case, the Court clarified the scope of the preemption provision in section 514(a) of ERISA, 29 U.S.C. § 1044, and the standards under which courts should determine whether state laws "relate to" employee benefits plans with the meaning of that provision. The *Travelers* case addressed the authority of the State of New York to impose a system of hospital surcharges that favored patients covered by certain public health insurance programs, while imposing significantly higher fees on patients covered by other insurance plans including private insurance policies and self-insured funds sponsored by health plans regulated under ERISA. In the *Travelers* litigation, both the District Court and the Second Circuit had ruled that New York hospital surcharges were preempted because they "related to" ERISA plans within the meaning of section 514(a). A unanimous Supreme Court rejected this interpretation of ERISA's preemption clause. Even under the broad language of ERISA's preemption rule, the Court emphasized, claims of preemption must be analyzed against a "starting presumption that Congress does not intend to supplant state law." __ U.S. __ (Slip. Op. at 8). Applying this standard in *Travelers,* the Court ruled that Congress did not intend to preempt state statutes such as the New York hospital surcharges that have only a tenuous or nondiscriminatory impact on ERISA plans.

Like the *Travelers* case, this petition concerns the effect of ERISA's preemption provision on a state law. The Massachusetts law in question here —Mass. Gen. L. c. 149, § 29 — established a bonding requirement for all public works contracts and

subcontracts in the Commonwealth of Massachusetts involving more than $5,000.[1] These bonding requirements ensure that full

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1. "Officers or agents contracting in behalf of the commonwealth or in behalf of any county, city, town, district or other political subdivision of the commonwealth or other public instrumentality for the construction, reconstruction, alteration, remodeling, repair or demolition of public buildings or other public works when the amount of the contract in the case of the commonwealth is more than five thousand dollars, and in any other case is more than two thousand dollars, shall obtain security by bond in an amount not less than one half of the total contract price, for payment by the contractor and subcontractors:

• for labor performed or furnished and materials used or employed therein, including lumber so employed which is not incorporated therein and is not wholly or necessarily consumed or made so worthless as to lose its identity, but only to the extent of its purchase price less its fair salvage value, and including also any material specially fabricated at the order of the contractor or subcontractor for use as a component part of said public building or other public work so as to be unsuitable for use elsewhere, even though such material has not been delivered and incorporated into the public building or public work, but only to the extent of its purchase price less its fair salvage value and only to the extent that such specially fabricated material is in conformity with the contract, plans and specifications or any changes therein duly made;

• for payment of transportation charges for materials used or employed therein which are consigned to the contractor or to a subcontractor who has a direct contractual relationship with the contractor;

• for payment by such contractor and subcontractors of any sums due for the rental or hire of vehicles, steam shovels, rollers propelled by steam or other power, concrete mixers, tools and other appliances and equipment employed in such construction, reconstruction, alteration, remodeling, repair or demolition;

• for payment of transportation charges directly related to such rental or hire; and

• for payment by such contractor and subcontractors of any sums due trustees or other persons authorized to collect such payments from the contractor or subcontractors, based upon the labor performed or furnished as

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and fair compensation will be paid to all those who provide labor and other services to contractors and subcontractors on public works projects in the Commonwealth. It protects the integrity of the Massachusetts public works industry. The protections of section 29 extend to a full range of contractor and subcontractor obligations: not simply wages earned, but also the costs of lumber and other materials purchased by workers in connection with covered employment, equipment rentals, transportation costs associated with covered jobs, and payments associated with any collectively negotiated fringe benefits, including benefits provided under supplementary unemployment benefit plans and health and welfare plans. Even though section 29 establishes a general procedure for ensuring payment of obligations arising out of Massachusetts public works projects, the First Circuit ruled that the provision was preempted under section 514(a) of ERISA to the extent that it extended to fringe benefits also regulated under ERISA. *Williams v. Ashland Engineering Co.*, 45 F.3d 588 (1st Cir. 1995). Adopting a mechanical approach to preemption similar to the one employed by the District Court and Court of Appeals in the *Travelers* litigation, the First Circuit labeled section 29 a local rule that "single[s] out ERISA plans for special swaddling" in a manner proscribed under section 514(a). *Id.* at 592.

The First Circuit's interpretation of ERISA's preemption

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aforesaid, for health and welfare plans, supplementary unemployment benefit plans and other fringe benefits which are payable in cash and provided for in collective bargaining agreements between organized labor and the contractor or subcontractors; provided, that any such trustees or other persons authorized to collect such payments for health and welfare plans, supplementary unemployment benefit plans and other fringe benefits shall, subject to the following provisions, be entitled to the benefit of the security only in an amount based upon labor performed or furnished as aforesaid for a maximum of two hundred and forty consecutive calendar days. . . ." Mass. Gen. L. c. 149, § 29 (indentations supplied).

clause in this case is clearly inconsistent with this Court's guidance in *Travelers*. In *Travelers*, the New York surcharges extended to ERISA-covered benefit plans and even had the undisputed effect of encouraging ERISA-regulated health plans to select certain favored types of insurance coverage. Nevertheless, this Court was unanimous in concluding that the New York surcharges did not have a sufficient connection with ERISA plans to warrant preemption. As Justice Souter stressed in Part II.B of his opinion, the surcharges advanced a rational state policy of cost containment and did not excessively burden the ERISA plans in question. Much the same can be said of the Massachusetts bonding requirement at issue here. The Massachusetts statute is designed to ensure the full compensation of parties participating in public projects in the Commonwealth. While the bonding requirement does extend to some ERISA-covered fringe benefits, no burden is placed on ERISA plans, and no limitations or restrictions are placed on the kinds of fringe benefits covered. Section 29 simply treats fringe benefits the same way it treats a full range of other obligations arising out of these projects. If, as *Travelers* holds, section 514(a) of ERISA does not preempt New York's general system of hospital surcharges, it is hard to see how the clause can be interpreted to preempt the Massachusetts bonding requirement at issue here.

In light of the strong parallels between the *Travelers'* case and this petition, we respectfully request that, if the Court does not accept this case for plenary review at this time, the Court should grant this petition, vacate the judgment of the Court of Appeals, and remand the case for reconsideration in light of *New York State Conference v. Travelers Insurance Co.*

Respectfully submitted,

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